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EFFECT OF THE UNIFORM SALES ACT ON THE PRE-EXISTING LAW IN PENNSYLVANIA

The Uniform Sales Act is, of course, in large part a mere statement of rules long settled by judicial decision. In some cases, however, where it was thought that improvement could be made by changing the established rule, the law was changed, and where the rule was not uniform among the states, what was supposed to be the better rule was written into the Act. It may be useful to call attention to the changes in the law of Pennsylvania resulting from the enactment of the Act in 1915, (P. L. 543) and the changes made in the Uniform Act before its enactment in Pennsylvania.

Section 2 requires infants and other incompetents to pay a reasonable price for necessaries sold and delivered to them. The necessity of the incompetent is to be determined by the facts at the time of delivery, though title may have passed when the goods were purchased. The liability of an incompetent for necessaries is not contractual.[1] Any promise implied in fact is as voidable as is his express

[1]Woodward on Quasi Contracts, Section 202.

promise. His liability should be limited by the benefit actually enjoyed. The Uniform Act was accordingly amended before enactment in Pennsylvania by permitting the incompetent to return the necessaries, if he acts within a reasonable time and returns the goods in substantially the same condition as when received. The right of an incompetent to avoid a sale of his goods, though the one to whom he sold had resold the goods to a bona fide purchaser for value, who bought in ignorance of the infancy or insanity of the original owner was settled law until Section 24 of the Act made the rule universal that a bona fide purchaser for value from one who has a voidable title acquires a good title. Contrast the right of an infant to avoid his obligation even on a negotiable instrument in the hands of a holder in due course.

The fourth section of the Sales Act renders unenforceable a contract to sell or a sale of goods or choses in action of the value of $500.00 or upwards, unless there be part delivery and acceptance or part payment or a memorandum signed by the party to charged. The seventeenth section of the English Statute of Frauds was never enacted in Pennsylvania and this provision of the Sales Act is the first legislation requiring any formalities to render enforceable a sale of goods.

Section 5, (3) provides: "Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods." Prior to this enactment a sale of goods in potential possession operated to transfer title as soon as they came into actual possession, (Henderson vs. Jennings, 228 Pa. 193) and the buyer was liable for the price. Now the action for damages for non-acceptance is the seller's only remedy. (Compare Secs. 63 and 64.)

Section 6 (2) provides: "In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods in

the mass, and though the number, weight or measure of the goods in the mass is undetermined." Prior to this enactment we could not say certainly that the doctrine of Kimberly vs. Patchin, 19 N. Y. 330, would be followed in Pennsylvania, though this case was cited with approval in Bretz vs. Diehl, 117 Pa. 589.

Section 12 defines an express warranty as follows: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon." The doctrine of Chandelor vs. Lopus, 1 Smith's Leading Cases (9th Am. Ed.) 329, that the seller must expressly warrant or use other words containing a direct and positive promise to be responsible for the truth of the fact asserted, was followed in Pennsylvania with less change than in any other American state. (Williston on Sales. Sec. 199.) McFarland vs. Newman, 9 Watts 55; Jackson vs. Wetherill, 7 S. & R. 480; McAlister vs. Morgan, 29 Super. 476. Chief Justice Gibson laid down the rule in the early cases that, "the naked averment of a fact is neither a warranty of itself or evidence of it." He esteemed highly the good old doctrine of caveat emptor. But, says Prof. Williston, "the law of Pennsylvania is peculiar." So now the maxim is reversed, and the seller must beware, for any statement about the goods, however honestly believed, may expose him to a damage suit, if it proves to be false and it influenced the buyer in deciding to buy. So now even descriptive statements are warranties, though it had been settled law in Pennsylvania that where the title had passed such words did not import a promise. Fogel vs. Brubaker, 122 Pa. 7; Ryan vs. Ulmer, 108 Pa. 332; 137 Pa. 310; Shisler vs. Baxter, 109 Pa. 443. Since this provision was adopted, the House of Lords of England has declared that, "It is contrary to the general policy of the law of England to presume the making of such a collateral contract in the absence of language expressing or implying it. It would entirely negative the firmly estab-

lished rule that an innocent representation gives no right to damages." Heilbut vs. Buckleton, (1913) App. Cas. 30. That this decision was a surprise, if not a shock, to the learned draftsman of the Act, see 27 Harvard L. Rev. 1.

Section 13. This section divides the common law implied warranty of title into (a) a warranty of the right to sell, (b) a warranty of quiet possession and (c) a warranty against undisclosed incumbrances. Prior to the Sales Act a buyer had no right of action in Pennsylvania until his possession was interfered with. Krumbhaar vs. Birch, 83 Pa. 426; Morrison vs. Whitfield, 46 Super. Ct. 107. Williston concedes that to regard the warranty as broken before eviction may lead to the buyer's right of action being barred before he is aware of a breach, and that it is difficult to estimate the damages prior to the assertion of the superior title. But the rule in Pennsylvania prior to the Act compelled the buyer to await the assertion of the adverse title or surrender the goods and assume the burden of proving that the seller had no title. He may now sue twice and recover in the second suit whatever damages he did not get in the first one.

Section 14 deals with the warranty implied when the goods sold are identified only by a general description and the seller undertakes to supply goods to meet this description. This section merely requires the goods to "correspond" with the description, and adds that the use of a sample shall not reduce this requirement though the goods correspond with the sample.

Section 15 limits the implied warranties of quality to two situations, first, when the buyer informs the seller of a particular purpose for which the goods are required and relies on the seller's skill or judgment, second, when goods are bought by description. In the first case the Act imposes on every seller, whether a manufacturer or dealer or neither, a warranty that the goods are fit for the particular purpose. In the second case the warranty of merchantable quality is imposed only on dealers.

In Griffin vs. Metal P. Co., 264 Pa. 254, it is said that the first provision imposes on every seller a liability previously only resting on manufacturers or growers. This is to confuse the general purpose for which a thing is made, e. g. a mower, to mow, and a reaper, to reap, and the particular purpose to which the buyer intends to put goods which may be used for a variety of purposes. It is true that Sellers vs. Stevenson, 163 Pa. 262, held that, while a manufacturer of wind-mills might impliedly warrant that they would work, a dealer selling them ready made did not. But this is hardly a case of such particular purpose as requires disclosure by the buyer that the seller may be informed of it. Port Carbon Iron Works vs. Groves, 68 Pa. 149, declares that when an article is ordered for a special purpose, (e. g. pig iron) that is, if the goods are described in the order as goods fit for the named purpose, the seller must select goods fit for that special purpose. But this is only a special application of the rule that goods sold by description must correspond with the description. The important change effected by the Sales Act is in imposing an implied warranty of quality on sellers of specific chattels, though sold upon inspection. The law had become fixed in Pennsylvania that in such cases there was no warranty but that of title. Fogel vs. Brubaker, 122 Pa. 7; Wilson vs. Belles, 22 Super. 477; Pyott vs. Baltz, 38 Super. 608. Now the seller must beware of selling goods unfit for a particular contemplated use, if this is disclosed and the buyer relies on the seller. The seller's occupation does not figure. "On the whole subject, the Pennsylvania law has been open to criticism, but the enactment of the Uniform Sales Act has presumably corrected its archaisms." Williston on Contracts, Sec. 1002, note 69.

In "executory sales," that is, contracts to sell goods by description, the cases cited above all recognized that the sellers warranted that the goods would be of the kind ordered and merchantable in quality. (But contrast Ryan vs. Ulmer, 108 Pa. at page 338.) "Subsection (2) re-

lates only to goods bought by description and expresses, therefore, a well settled rule. Though the terms of this subsection are confined to dealers, it is not to be supposed that one who is not a dealer and who contracts to sell goods by description to be furnished in the future, can perform his contract by tendering unmerchantable goods. It is only where the goods are actually bought that subsection (2) is applicable." Williston on Sales, Sec. 248 at page 335.

Now, remember, this section first of all declares that it will enumerate all the warranties of quality. Merchantableness is then treated as a matter of quality. It is a universal requirement in all sales by description but the only sellers to which it is expressly made to apply by the only relevant section of the Act are dealers. By goods "bought," we suppose is meant, goods which the buyer accepts. Does he mean that in such cases the warranty of merchantableness survives acceptance in case of dealers but not as against other sellers? He cannot. Section 49 expressly provides that liability for breach of all warranties, whether "in damages or other legal remedy," e. g. rescission, shall survive acceptance of the goods, if notice of the breach be given within a reasonable time. What this special warranty is which is imposed upon dealers only is not clear. And where we are to find in the Act the degree to which goods sold by description must "correspond" with the description is not clear. We are glad to know that the Act must not be regarded as a step backward even in such an archaic state as Pennsylvania, and that in all contracts to sell by description the seller still warrants kind and merchantableness.

Subsection (3) provides: "If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed." Shisler vs. Baxter, 109 Pa. 443, and Lord vs. Grow, 39 Pa. 88, held a purchaser who bought on inspection a particular kind of seed to be without remedy, though he got a different kind of seed, which it was impossible to distinguish by

its appearance. It would seem that since the buyer must rely on the seller's selection and statements in these cases, the Act would give him a remedy.

Though the Sales Act repeals inconsistent acts, as it specifically repeals the Act of 1887 and does not repeal the Act of May 4, 1889, P. L. 87, we may assume that food sold must still correspond in quality, as well as kind, with the description given, and unless otherwise agreed, it must be fit for household consumption. This Act operates against all sellers, whether dealers or not, and in favor of all buyers, whether they buy for consumption or not. See 10 Dickinson Law Review 135, and Weiss vs. Swift & Co., 36 Super. 381. But for our Act of '89, any implied warranty in sales of food would extend only to sales by dealers to buyers for immediate consumption, 2 Williston on Contracts, Sec. 996, page 1874..

Section 16 deals with sales by sample. The Act of April 13, 1887, P. L. 21, Sec. 1; repealed by Sec. 77 of Sales Act, required the bulk to correspond with the sample in quality. This is repeated in Section 16 of the Sales Act. The Sales Act expressly assures the buyer "a reasonable opportunity of comparing the bulk with the sample," unless the buyer agrees that the goods be shipped "C. O. D." It also provides the same warranty of merchantable quality, "if the seller is a dealer in goods of that kind," as in sales by description, unless the defect was apparent on reasonable examination of the sample. The decisions in Pennsylvania prior to the Act of '87 made the sample a standard only of the "kind," but required that the article be merchantable for "an unmarketable article is substantially different in kind from one that is salable in the market." Boyd vs. Wilson, 83 Pa. 319, and the exhaustive article of Dean Trickett in Vol. 13 Dickinson Law Rev. 1. "The whole law of warranties, express and implied, as it existed in Pennsylvania prior to the Act is open to criticism," says Williston on Sales, page 342, note 38. "A statute is the more necessary." Sec. 199 at page 254. Again we need

to be assured that the Sales Act is not a step backwards in Pennsylvania in limiting the warranty of merchantableness in sales by sample to dealers only. That such limitation was intentional, see Williston on Contracts, Sec. 1006.

Section 18 provides that the time when the title to specific goods passes depends on the intention of the parties, to be ascertained from the usages of trade and the circumstances of the case, as well as from their words and conduct, and when there is doubt from the rules of presumption recited in the following section.

Sec. 19, Rule 1, provides that in a sale of specific goods, in a deliverable state, the parties are presumed to intend that the title shall pass when the contract is made, though no money be paid nor goods delivered. In the seventeenth century the seller's lien was hardly recognized and Blackstone regarded a cash payment or delivery as essential to the transfer of title. There are only a few cases in Pennsylvania discussing the seller's lien. Welsh vs. Bell, 32 Pa. 121, and various later cases follow Blackstone. Accordingly the risk of loss was on the seller and he could not sue for the price of a specific chattel, prior to the Act, unless there had been payment or delivery. See Brown vs. Reber, 30 Super, 114; Mervine vs. Arndt, cigar bands, 33 Super. 333; Robb vs. Zern, 42 Super. 182. But contrast Reynolds vs. Callender, 19 Super. 610, Henderson vs. Jennings, 228 Pa. 188; and Steiner vs. Turner, 45 Super., 225, (article specially made for buyer,) and 12 D. L. Rev. 274. "If the parties when they make their bargain contemplate an exchange of the goods for the price immediately on making the bargain, the sale is to be regarded as a cash sale, (i. e. payment is an implied condition of the transfer of title.) On the other hand, if the parties do not contemplate an immediate exchange of the money for the goods, even though they do contemplate that possession of the goods shall not be delivered until the price is paid, it is presumptively an absolute sale as soon as the parties are

agreed on the terms of the bargain and the goods are in a deliverable state." Williston, page 549.

Since the Sales Act the right of an unpaid seller who has refused to extend credit is a right of possession merely and the title having passed, the seller's right to collect the price is clear. Sec. 63, (1.)

Prior to the Sales Act it was the presumed intention of the parties, where the goods were to be weighed or measured to ascertain the price, that title should not pass until after weighing or measuring, unless the goods have been delivered. Compare Nicholson vs. Taylor, 31 Pa. 128 and Miller vs. Seaman, 176 Pa. 291 with Scott vs. Wells, 6 W. & S. 357. The English Sale of Goods Act limits the rule to cases in which the seller is to take part in the weighing or measuring. Williston says this rule is "founded on a mistake, has no principle behind it" (Sales, Sec. 266,) and it has been abandoned in the Sales Act. This change must not be confused with the rule that where something is to be done by the seller to put the goods into a deliverable state, the presumed intention of the parties is that the property even in specific goods shall not pass until such thing is done. This doctrine, recognized in Nesbit vs. Burry, 25 Pa. 208, is enacted in Sec. 19, Rule 2, of the Sales Act. The remaining rules of Sec. 19 express the previously settled law of Pennsylvania.

Sec. 20 (3,) provides that a seller reserves his right of possession by consigning the goods to the order of the buyer or his agent and retaining possession of the bill of lading. This provision harmonizes with the plan of the Uniform Bills of Lading Act, which requires the surrender of order bills before delivery of goods by the carrier but permits delivery to the buyer named as consignee in a straight bill. See Secs. 12 and 14 of Bills of Lading Act of June 9, 1911. P. L. 838.

Prior to the enactment of the Uniform Bills of Lading Act the Act of Sept. 24, 1866, P. L. 1363, was controlling and by its terms all bills of lading were made negotiable,

if not marked non-negotiable, and those negotiable were required to be surrendered before the delivery of the goods.

The other subsections of section 20 express existing law.

Sec. 21, (1) provides that "where goods are put up for sale by auction in lots, each lot is the subject of a separate contract of sale." This reverses the rule of Coffman vs. Hampton, 2 W. & S. 377, Kerr vs. Shroder, 1 W. N. 33 and Tompkins vs. Haas, 2 Pa. 74, which held that all the purchases of the same buyer constitute but one contract.

Sec. 21, (2,) provides that until the fall of the hammer or the auctioneer declares the goods sold, any bidder may retract his bid, but if the sale has been announced to be without reserve, the auctioneer may not withdraw the goods from sale. "If the contract is incomplete so far as the bidder is concerned, it must also be incomplete so far as the auctioneer is concerned." See Williston, p. 447. The Act does not provide that a bidder may not at any time withdraw his bid, if the sale is announced to be without reserve. But if the auctioneer is bound beyond withdrawal in such cases, the bidder must be also, unless released by a higher bid. Fisher vs. Setzer, 23 Pa. 308 had established the general rule that both bidder and auctioneer were free to withdraw until the hammer fell. "Sales without reserve" are a novelty in Pennsylvania and we must wait for the courts to say what the position of a bidder is at such a sale. The Act appears to adopt for special use in such cases the view advocated by Langdell that the auctioneer makes an offer, namely to sell a specific chattel to the person and at the price fixed by the bidding and that a bidder accepts and is then bound, unless released by a higher bidder taking his place. Subsections (3) and (4) express the settled law.

Sec. 22 provides that the risk of loss is on the buyer only from the time he becomes the owner, except when he has possession under a conditional sale contract, or where delivery has been delayed through his fault. But destruc-

tion after the bargain ends the seller's obligation. Sec. 8 (1.) Of course an express agreement as to risk of loss at any stage would be enforceable. The Act has performed a service in fixing the rule in cases where the buyer's non-payment of the price or failure to take delivery on request has prevented the transfer of title. For a discussion of the law in conditional sales before the Act, see 18 Dickinson Law Review 202; and for a discussion of the change involved in the second exception, see Vol. 1 Wis. Law Rev. page 311.

Sec. 23 provides that a buyer generally gets no better title than his seller had, unless the real owner has estopped himself to assert his interest or the case falls within some statute e. g. a factors' act or a recording act. Of the latter type is the conditional sales act of 1915. P. L. 866. What will create an estoppel is a question not always easy to answer but the Act leaves this question for the courts to settle. In Pennsylvania one who makes delivery under a contract of conditional sale is estopped, though in most jurisdictions the contrary is the law. A uniform rule would have been useful, but the subject was evidently thought to be big enough to require a special statute to cover it. A uniform Conditional Sale statute has been completed by the Commissioners on Uniform State Laws but awaits enactment in Pennsylvania. See Vol. XLVI Reports of A. B. A. Page 714. The further question so much litigated in Pennsylvania, namely, the distinction between a conditional sale and a bailment, is not aided in its solution by any of the provisions of the Sales Act.

As noted above, Sec. 24 provides that where the seller has a voidable title, a purchaser in good faith, for value, and without notice of the seller's defect of title, takes a perfect title. In the case of sales made by lunatics and infants and a resale to an innocent purchaser, this cutting off of the incapable's right to avoid his sale is a startling change in the law. "The advantage to trade and the stability of titles justifies the diminution in the privilege of infants and luna-

tics," says Williston (Sales, p. 563.) It may be asked whether, if this is a dominating consideration, why not protect an innocent purchaser from a bailee or even perhaps from a finder of goods?

Secs. 25 and 26 cover the rights of purchasers from or creditors of a seller who continues in possession of the goods after he has sold them. The former section gives absolute protection to purchasers in good faith, for value and without notice of the prior sale. But Sec. 26 merely tells us that creditors of the seller may treat the sale as void, "if such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law." In short, instead of a uniform rule in such cases, the old law of each state continues to control. For a good discussion of the rule that a sale without delivery is fraud in law in Pennsylvania, see Riggs vs. Bair, 213 Pa. 402.

Secs. 27 to 40 deal with documents of title, that is, bills of lading and warehouse receipts. The prior enactment in Pennsylvania of the Uniform Bills of Lading Act and the Uniform Warehouse Receipts Act and the provision of Sec. 78, of the Sales Act that nothing in it should be taken to repeal anything in these earlier acts, render any discussion of these sections as superfluous as are the sections themselves in Pennsylvania. Their presence in the Sales Act is a snare and a delusion and can serve no useful purpose. The writer has delivered himself in extenso on this topic in the November and December issues of Volume XX, (1915) of this publication and will not repeat here what was then said. Suffice it to say that all that is said in these sections must be discounted and reference must be made in any case to the act dealing with the particular document involved in the case, for the acts are not in accord with each other on many points and the attempt to state propositions in the Sales Act purporting to be the law as to both kinds of documents, with a disconnected warning tacked on at the end of the Act that it does not have the usual effect of

repealing prior legislation on these matters, can only operate to mislead the unwary practitioner or student.

Section 43, (3) provides that "where the goods at the time of sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf; but as against all others than the seller, the buyer shall be regarded as having received delivery from the time when such third person has notice of the sale." As noted above, the Pennsylvania rule was, and still is, that retention of possession by a seller is fradulent as to his creditors and later purchasers from him without notice. But it has been the law in Pennsylvania, that, when at the time of the sale, possession of the property is in a bailee of the seller, and the seller does not take possession after the sale, the rule requiring a change does not apply. Linton vs. Butz, 7 Pa. 89. It is hardly to be supposed that this section will be construed as operating to change this rule by requiring notice to the bailee to render the goods immune against creditors of the seller or innocent purchasers from him. But if it has not this effect, it has no use in the Act and it can only serve to mislead the student. It is true, however, that in Linton vs. Butz, supra, the bailee had kept the article to repair it for the buyer.

Sec. 44 (2,) provides that, "where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole." Subsection 4 qualifies this harsh rule by providing: "The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties." It was decided in Brownfield vs. Johnson, 128 Pa. 245, following Lockhart vs. Bonsall, 77 Pa. 53, that "where the article is uniform in bulk and the act of separation throws no additional burden on the buyer, a tender of too much, from which the buyer is to take the proper quantity, is a

good delivery." Williston says this requires the buyer to assume the chance of a dispute with the seller as to the correctness of the buyer's separation. Sales, Sec. 461. Whether this be a sufficient reason or not, the Act establishes a general rule and opens the door to an arbitrary rejection of the whole, unless the excessive tender can be justified by a usage of trade or course of dealing. Doubtless the custom to keep in bulk goods of the character involved in the cases cited above, to wit, nuts and oil, had its influence in the decision of the cases and for this reason, perhaps, like decisions, would be reached today, notwithstanding the provision of Sec. 44, (2.)

Section 49 provides: "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty, within a reasonable time after the buyer knows or ought to know of such breach, the seller shall not be liable therefor."

Section 69 provides: "Where there is a breach of warranty by the seller, the buyer may, at his election, (a) Accept or keep the goods, and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price; (b) Accept or keep the goods, and maintain an action against the seller for damages for breach of warranty."

In Luella Coal and Coke Co. vs. Gans, 61 Super. 37, Judge Kephart said: "When a vendee of a certain kind or class of goods has an opportunity to inspect them before acceptance, and after such inspection, knowing their inferior quality, takes the goods and disposes of them, he will be liable for the contract price."

In Noble vs. Edwin, 50 Super. 72, the following charge was held proper: "As there is no implied warranty as to quality, when goods are received, if they are of

the kind that were ordered and they are of inferior quality, the purchaser has a right to a reasonable time for inspection and if he is not satisfied, that is, if they are not of the grade that was ordered, he may elect to return them, refuse to receive them, or he may keep them; and if he keeps them, if they were the kind that were ordered, although of an inferior quality, he affirms the contract to such an extent that he is bound to pay the contract price, notwithstanding they are of inferior quality, because by his keeping them and not returning them, thus using them, he affirms the contract."

This doctrine was reiterated by Justice Kephart in Samuel vs. Del. River Steel Co., 69 Super. 605, but it was emphasized that: "The acceptance of goods not ordered without protest or complaint will not estop the vendee from setting up the breach of the implied warranty when sued for the contract price of the chattel ordered." The question thus became whether the goods were so inferior as to differ in kind or merely in quality. On the appeal in this case from the Superior to the Supreme Court, 264 Pa. 190, it was held that all warranties, whether express or implied, survived acceptance. Mr. Justice Schaffer was of counsel for the buyer and relied on the Sales Act, quoted above, but the Supreme Court, as the Superior Court, refrained from any reference to the fact that the matter was covered by express statutory provision, an attitude too frequently displayed by the courts toward acts which attempt to codify the common law.

It would therefore appear that there may be such a disparity between the quality of the goods ordered and those tendered as to justify rejection but that the disparity may not be so great as to constitute a difference in kind, and so amount to an implied warranty which will survive acceptance.

The right to accept goods and later set up the breach of warranty is recognized also in Diamond City Beef Co. vs. Murdock, 270 Pa. 455, Wright vs. General Carbonic Co.,

114 Atl. 517 and Hoffman vs. Hockfield Bros., 75 Super. 595.

In Wright vs. General Carbonic Co., Supra., Justice Sadler points out that the requirement of Sec. 49 of the Sales Act that the buyer give notice of breach of warranty within a reasonable time after he knows or ought to have known of it, on pain of losing his right of action for breach of warranty, is a change in the existing rule. Such omission always barred rescission but not the remedy in damages.

Prior to the Act it was the law of Pennsylvania that a buyer could not accept a late delivery and set up the delay as a partial defense when sued for the price, if on date of delivery he could have secured the goods in the market. Blakeslee Mfg. Co. vs. Hilton, 5 Super. 189, but an exception was recognized where the goods were being specially made of peculiar pattern or when for other reason it was impossible for the buyer to obtain sufficient goods of the kind and quality contracted for. Rockwell Mfg. Co. vs. Cambridge Springs Co., 141 Pa. 386. Section 49 of the Sales Act permits acceptance in all cases and preserves the buyer's claim for damages in all cases.

Sec. 58 (c) provides that goods are no longer in transit within the meaning of Sec. 57, (the section providing for the right of stoppage in transitu), "if the carrier or other bailee wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf." No American cases are cited by the draftsman for this proposition and the case of Allen vs. Mercier, 1 Ashmead 103, is to the contrary.

Subsection (3) of Sec. 63, permits a seller to specifically enforce an executory contract to buy, whenever the goods cannot readily be resold for a reasonable price. If the buyer refuses to receive the tendered goods, the seller may notify him that he will hold the goods for him and he may proceed to collect the price. Ballentine vs. Robinson, 46 Pa. 177, and Larkin vs. Schwitzer, 54 Super. 238, were cases of goods made specially for the buyer, and adopted this rule, but that a seller could not do this in other cases in

Pennsylvania, see Unexcelled Fire Works Co. vs. Policies, 130 Pa. 536; Jones vs. Jennings, 168 Pa. 493; and Puritan Coke Co. vs. Clark, 204 Pa. 556. "Courts of equity have confined the right of specific performance of affirmative obligations in regard to personal property so narrowly that either injustice must be done or the necessary remedy must be sought in another way. Where a seller has prepared goods of a special and peculiar kind under a contract and the buyer wrongfully refuses to take them, * * * damages are not an adequate remedy." Williston, Sec. 573. "But except in the limited class of cases where equity gives specific performance of a contract to sell chattels, an action for damages is the buyer's only remedy for the seller's refusal to transfer the property in the goods as agreed." Id. Section 598.

Section 69 defines a buyer's remedies for breach of warranty. Subsection (1), (d) gives the right "to rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid." Prior to this enactment the buyer had no right to rescission for the breach of an express collateral warranty in the absence of fraud. Kase vs. John, 10 Watts 107; Freyman vs. Knecht, 78 Pa. 141; Eshleman vs. Lightner, 169 Pa. 46. "The desirability of such a remedy depends purely upon the business customs of a community and on whether it appeals to the natural sense of justice. * * * * The morality of taking advantage afterwards of false statements innocently made, by insisting upon retaining the advantage of a sale induced thereby, is almost as questionable as that of making knowingly false statements to bring about the sale." Williston on Sales, Section 608. Of course rescission was always allowed for a fraudulent warranty. Nelson vs. Martin, 105 Pa. 229. Professor Burdick ably championed the Pennsylvania doctrine but the draft followed the Massa-

chusetts rule. See the spirited debate in 16 Harvard Law Rev. 465 and 4 Columbia Law Rev. 1, 195 and 265.

Section 74 provides: "This act shall be so interpreted and construed, if possible, as to effectuate its general purpose to make uniform the law of those States which enact it." It may cause surprise that a legislature should so enjoin the courts and then make various changes in the Uniform Act before enacting it. This they did.

Section 2 was amended as stated at the outset of this article.

Section 20 was amended by adding the words: "but delivery to the endorsee of the bill of lading shall discharge the carrier from all responsibility for the goods."

Section 31 was amended by adding: "(b) Nothing in this section, nor in any other provision of this act, shall be construed to impose upon any common carrier any obligation to require the surrender of the bill of lading or shipping receipt before making delivery of the goods, where, by the terms of said bill of lading or shipping receipt, the goods are deliverable to the consignee without surrender of such bill of lading or shipping receipt."

Section 47, Third, requires payment of the price before a buyer may examine goods shipped C. O. D. This section is amended by requiring "proper written authority to the carrier" permitting such examination, when the seller has agreed to permit examination before payment of the price.

Section 59, as amended, requires that the notice of a seller to the carrier to stop goods in transit "state that the buyer is insolvent and has not paid the seller of the goods."

Section 64, Fourth, requires that loss of profits resulting from interrupted performance be "considered" in estimating damages. As amended, the words "allowed for" are substituted for "considered."

Section 68 gives a buyer of specific goods a right to get specific performance in a court of equity, "if it (the Court) sees fit." As amended, "if the remedy at law be inadequate," is substituted for "if it sees fit."

Section 71 is amended by adding: "All implications from surrounding circumstances, or from the nature of a contract or agreement, shall be regarded as forming part of the contract or agreement."

JOSEPH P. McKEEHAN.

MOOT COURT

POWERS vs. GIFFORD

Trespass—Act of 1887—Conversion of Timber—Measure of Damages

STATEMENT OF FACTS

Powers owned land on which trees were growing of various sizes and species. Gifford negligently set fire to the trees, and they were all destroyed. In this action of trespass damages are sought. Defendant contends that the measure of damages would be the market value of the trees in the state of growth in which they were when the fire occurred. Powers insist that the measure is the amount by which the value of the tract was reduced by the fire.

Shearer for the Plaintiff.
Sloan for the Defendant.

OPINION OF THE COURT

SCHLEUSS, J.—Since, by the Procedure Act of 1887, the actions of trover, trespass on the case, and trespass, were amalgamated into one form of action, called Trespass, the plaintiff has brought the proper action to recover damages incurred by him for the trees growing upon his property which were destroyed by the negligence of the defendant, and it was not necessary for him, as contended by defendant, to bring an action of trespass quare clausum fregit, in order to recover the injury to the realty.

When standing timber is destroyed, the damages therefor are to be measured by determining the difference in the value of the land upon which the trees grew, before and after the injury complained of. There may be exceptions, (as in the case of trees growing upon a nursery farm). This rule, however, has also been applied to recovery for the destruction of ornamental trees and shrubbery.—49 Supr. Ct. 641. Under the facts in the case at bar, there can be no doubt that the ordinary rule in determining the pecuniary damage suffered by the plaintiff, would apply.

Where the trees come within the category of those which, when fully grown are made into lumber and treated as chattels or commodities, the damages recoverable for the destruction of such trees, if fully grown when destroyed, might be accurately computed to be the market value of them at the time of such destruc-

tion; but where trees are growing which beautify the land upon which they grow or are of such a nature that they will have no special value, when fully grown, as lumber or firewood, their worth cannot accurately be determined by calculating the amount of cord wood or lumber the trees may be made into if cut down, since the destruction of such growing trees may be a permanent injury to the property and permanently impair the value thereof. In the latter case, it would seem to be inequitable indeed to allow as damages for their destruction, the market value of the trees, but the injury to the property as a whole which was occasioned by the ruin of the timber, should be taken into consideration.

There seems to be nothing in the facts upon which this case is based, from which we may determine whether the trees were of such a character as to be valuable solely because of their fitness for cord wood or lumber or whether the land upon which they were situated was increased in value because of their existence thereon, except the fact that they were growing trees. Since, however, the timber had not reached maturity, it is reasonable to suppose that the trees had little or no market value as fire wood or lumber in the state of growth in which they were when destroyed, and consequently their destruction could only lessen the value of the land, and since the injury to the property was the direct result of the defendant's negligence, we thing that he should bear the loss of the plaintiff, and such loss can only be determined by what we think is the true measure of damages in this case, the difference between the value of the land before the destruction of the timber and the value of same after the injury complained of.—45 Supr. Ct. 468, 16 Supr. Ct. 365, 251 Pa. 253, 235 Pa. 417, 229 Pa. 285.

Judgment for plaintiff.

OPINION OF THE SUPERIOR COURT

The trees were of various sizes. They were not ready to be cut for conversion into timber and lumber. If they had been, the value of the wood which they contained, and which was destroyed, might be accepted as the loss by the fire.

But they were at various stages of growth. The life of them, but for the fire, would have doubled, quadrupled, decupled, centupled, the amount of wood in them. For the loss of this creative force, some compensation surely should be made. It would be inadequate compensation to allow the market value of the wood in the trees as it was at the time of the fire.

We know no better measure of the damage than the difference between the value of the land denuded of its trees by the fire, and its value, the trees being unhurt. Cf. Mehaffy vs. N. Y. Cent. R. R.—229 Pa. 285; Bullock vs. R. R. Co.—235 Pa. 417. The judgment of the learned trial court must be

AFFIRMED.

DAVIS vs. STEWART

Assignment of Patent—Construction of Contract—Escrow

STATEMENT OF FACTS

We have in this case an agreement to assign a patent for a certain price. The agreement was completed and paid for, part money and part by note, the note payable in one year, but until the note was turned into money the assignment was to remain with X in escrow. When the note became due the defendant refused to pay on the ground that the agreement as he understood it depended only upon whether he wished to accept the patent at that time or reject it, and thus cancel the agreement.

X. Beck for the Plaintiff.

Bloom for the Defendant.

OPINION OF THE COURT

T. BECK, J.—The agreement, the cash and note, and the deposit of the assignment with a third party in escrow all serve to indicate clearly a completed contract. And the rule of law raises a presumption in favor of a completed instrument and that an intention to the contrary must clearly appear.—16 Cyc.; 50 Atl. Rep. 776.

An escrow imports a legal obligation, when the event happens or the time arrives that the thing agreed upon is to be given to the grantee or the promisee accepted and paid for.

When the possession of the deposit is subject to the control of the depositor an instrument cannot be said to be delivered and it is not therefore in escrow.

The contract of deposit is not revocable at the mere will of the parties nor will death break it. Note 130 A. S. R. 920.

If the thing in escrow is retained wrongfully equity will interpose and compel delivery. Equity regards that as done which ought to be done and at the time when it ought to done. In the doctrine of specific performance of contracts to convey property the purchaser is treated from the moment the contract is made as the owner.

A depositary is a trustee of an express trust with duties to perform for each of the parties and which neither can forbid without the consent of the other.—216 Wis. 121, 115 S. W. 987, 129 A. S. R. 502, 77 Cal. 279, 72 Cal. 133.

An escrow executed and deposited upon a valuable consideration is not revocable except upon the terms of the agreement and deposit.—156 Cal. 353, 14 Ohio 307.

Such delivery may be compelled by the party entitled to the instrument.—100 Mich. 574, 59 N. W. 238.

Where there has been an irrevocable deposit, the grantor may enforce specific performance of the contract on the part of the grantee to compel him to pay over the purchase money agreed upon,—20 Ohio St. 223.

A formal tender of the instrument is not necessary to enable the grantor to sue for the purchase money, the payment of which was the condition precedent to the instrument taking effect.—87 Mo. 602.

The burden of proof is usually upon him who alleges the instrument to be an escrow with conditional performance at the option of one of the parties.—6 Tenn. 404.

Parol evidence is not admissible to prove the condition upon which the instrument is deposited if the condition be in writing. —23 Wash. 425.

The defendant was a bona fide purchaser for value and there must be some substantial reason shown for setting aside an agreement.—5 Cal. 182.

This court is of the opinion that there was a completed contract to sell and that the price was paid by cash and note and that the only matter held in abeyance was the transfer of the assignment held in escrow which was to be done when the note was turned into cash at the end of the year. Either party could compel the other to carry out the agreement or secure proper damages.

Judgment reversed.

OPINION OF THE SUPREME COURT

A sale of a patent right was intended. The owner of it, A, agreed to sell it to B for a certain sum, until the payment of which it was to be put into the hands of X to hold as an escrow; when it was paid for, the depositary, X, was to deliver it to B, the vendee. This is an action of assumpsit in assertion of the contract, its purpose being to secure payment of the note. On the other hand, the vendee was assured of the delivery of the patent to him by the fact that the assignment of it has been deposited

with X as an escrow, and that X would be personally liable to him if he permitted the vendor to secure possession of it. Such is the view taken of a similar case by the Superior Court, McMillan vs. Davis—5 Supr. 154, and by the Supreme Court—243 Pa. 570.

The judgment of the court below must be

AFFIRMED.

ROBERTS vs. PARITT

Trespass—Easement—Equitable Servitude

STATEMENT OF FACTS

X owned a lot one hundred feet wide in a town. On one part of this lot he erected a house. He then sold the part adjacent to the site of this house, over which a cornice on the side of this house projected one foot. After twenty-five years the buyer of this land sold it to Roberts. Paritt bought the house from X. Roberts filed a bill to compel Paritt to remove the cornice.

Counsel:

OPINION OF THE COURT

SHAHADI, J.—The question which comes before this court to be decided is, whether or not, a grantee of property over which a cornice has extended for twenty-five years can by a bill in equity compel the owner of the cornice to remove it.

An easement is an acquired right or privilege and enjoyment falling short of ownership. Such a right must be acquired by adverse, open and notorious possession. In the case at hand it seems very clear to this court that Paritt the defendant has acquired such an easement. The cornice has extended over Roberts' land for twenty-five years. It was there adversely, open and notorious.

A case clearly on point is as follows:

An owner of two lots built on one of them a house, the cornice of which projected over the other lot. Subsequently the owner sold the house and the land on which it stood. By subsequent conveyances the title to the other lot came to plaintiff and the title to the house afterwards came back to the original owner.

It was held where the projection of a cornice over another's land is apparent and continuous for more than twenty-one years, an easement will be acquired by prescription. And this is so although the title to both premises were in the same owner during the twenty-one years, but not concurrently.

153 Pa. 294 Methodist Episcopal Church vs. Dobbins.

Chief Justice Gibson said, where an owner of land subjects part of it to an open, visible, permanent and continuous service or easement in favor of another part, and then aliens, the purchaser takes subject to the burden or benefit as the case may be.

8 Pa. 383 Siebert vs. Levan.

48 Pa. 178 Phillips vs. Phillips.

How far the question of necessity enters into the creation of such an easement need not be discussed. The cornice was a substantial and permanent part of the house as it existed when conveyed, and the right to maintain it cannot be controverted by the grantor or those succeeding to his title.

153 Pa. 294 Methodist Episcopal Church vs. Dobbins.

It has been also held, where a continuous and apparent easement is imposed by the owner of real estate on a part thereof for the benefit of another part, the purchaser at a private or judicial sale, in absence of an expressed reservation or agreement, takes the property subject to the easement or servitude, even though it is not mentioned in his deed.

74 Superior 223 Blauser vs. Carson.

From all the forgoing decisions and authorities this court must decide in favor of the defendant.

OPINION OF THE SUPREME COURT

There are two distinct grounds on which Paritt may be held to have a right to continue the cornice. X, as owner of both pieces of land, had subjected the piece now owned by Roberts to an equitable servitude. He had suspended the cornice over it. When he sold it, he retained a right to continue to maintain the cornice as against his vendee. "Where," says Grace M. E. Church vs. Dobbins, 153 Pa. 294, "an owner of land subjects part of it to an open, visible, permanent and continuous servitude or easement, in favor of another part, and then aliens either, the purchaser takes, subjects to the burden, or the benefit, as the case may be." Liquid Carbonic Co. vs. Wallace, 219 Pa. 457; Manbeck vs. Jones, 190 Pa. 171. The projection was visible to the purchaser of the land over which it hung; and he had no reason to believe that X was intending to surrender the right to the maintenance of it.

A second and distinct reason for holding that Paritt has a right to maintain the cornice is that it has been thus maintained for over 21 years. That rights restrictive of another's power over his land may be thus acquired is too well known to require confirmation. The judgment of the learned court below must, then, be

AFFIRMED.

TOME vs. SPOIL

Speech to Jury—Statements Unwarranted by Evidence—Damages

STATEMENT OF FACTS

Trespass for personal injuries. In Tome's attorney's speech to the jury he stated what damages should be allowed; and asserted facts tending to show malice on Spoil's part, for which there was no evidence. Objection was made by Spoil's counsel, but the court allowed the case to go to the jury. The jury returned a verdict of $10,000. The court set aside the verdict and awarded a new trial.

Sternthal for Plaintiff.
Werblun for Defendant.

OPINION OF THE COURT

SLOAN, J.—The authorities as to the proper proceedure in a case involving the question as presented in the case at bar are very numerous in this state; our Supreme Court has had more than one occasion to deal with such actions on the part of counsel, and has properly dealt with them no doubt for the use of such unfair means in arguing their cases.

We need only quote from a few of the leading cases lately decided to show the position our courts have taken. In Saxton vs. Pittsburgh Railways Company, 219 Pa. 492, the court said:

> "No verdict that may have been obtained by such means should be allowed to stand and the effective remedy is to withdraw a juror and continue the case."

The language above quoted was used in connection with statements of the counsel as to the amount of damages to be given in an action for personal damages. The remarks were not based upon any evidence and were prejudicial to the defendant.

We quote further from the leading case on this point, Holden vs. P. R. R. Co., 169 Pa. 1; this like the previous case was an action for personal injuries and prejudicial statements were made by counsel. The opposing counsel requested that a juror be withdrawn and the case continued. The request was refused by the court and exception was taken. The court said:

> "The matter being before us in this case in a legitimate manner, we are bound to say we consider the assignment well taken. The comments of counsel complained of were of the most offensive and reprehensible character, not sustained by any evidence in the cause and justly deserving the severe censure of the court. We can discover nothing to palliate

them in the least degree, and inasmuch as there was no other efficacious remedy available to correct the mischief done, it was the plain duty of the court to withdraw a juror and continue the cause.

Although we question somewhat the action of the court below in the trial of the case, we are not justified in interfering with the result they finally reached, as it is the only proper and just way to deal with such actions on the part of counsel. The learned counsel in the trial court when objecting to such offensive and prejudicial statements should have followed this action up with a request for the withdrawal of a juror, since the learned court below was so insensible to its "plain duty" (as the court said in the case of Holden vs. P. R. R. Co.). It was the duty of the court in the present case to either instruct the jury to disregard the statements, or, if they be so offensive to the cause of the other party as to warrant such action, to withdraw a juror and continue the case.

Other cases involving the same question and following the above mentioned cases are: Davis vs. Stowe Township, 256 Pa. 86; and Wagner vs. Hagle Township, 215 Pa. 219.

OPINION OF THE SUPREME COURT

The attorney asserted, in his address to the jury, the existence of facts which did not exist, and which, had they existed, would have inflated the damages. What is the remedy?

The court could and should withdraw a juror, and so arrest the case. By this dramatic act, a severe reprimand would be administered to counsel in the face of the jury and public.

This was not done in this case. The jury was allowed to deliberate and deliver a verdict. The remedy, in that case, would be to set aside a verdict, and award a new trial. This, though perhaps a less impressive rebuke, is reasonably effectual, and would obliterate the error as far as the appellate court is concerned.

Had the verdict been allowed to stand, and judgment been rendered on it, the appellate court would have been constrained to reverse the judgment, and remand the cause for a new trial.

The trial court having done what, had it tolerated the verdict, the appellate court would have done, its action must be approved.

AFFIRMED.

See the cases cited by the learned court below.

WILLIAM ALLEN vs. THOMAS ALLEN

Illegitimacy—Libel—Privilege—Pleadings—Capacity to Inherit Property

STATEMENT OF FACTS

Stoke's will devised a farm to the children of his daughter, Sarah. She had two sons, William and Thomas. Thomas takes sole possession denying that William is legitimate. William brings ejectment and satisfying the jury of his legitimacy obtains judgment for and undivided half of the land. He now sues Thomas for libel.

Teel for the Plaintiff.

Rose for the Defendant.

OPINION OF THE COURT

SCHATZ, J.—That accusing one of being illegitimate is libelous is a question which has been decided by the courts in Mix vs. The North American Co. et. al., 12 Pa. Dist. 446, and 24 Cyc. 264.

However, the question for the court to decide is whether Thomas Allen was privileged in making the statements as to William's legitimacy and if he was, was he absolutely or conditionally privileged. If Thomas was absolutely privileged malice will not destroy that privilege; if conditionally privileged actual malice will destroy. Defamatory statements made for the protection of the maker's property interests is a qualified privilege if there is no malice. In the case at bar, Thomas was protecting his property interest and was therefore conditionally privileged. When a person is conditionally privileged the burden of proof of showing his malice is on the plaintiff. 139 Pa. 334, Conroy vs. Pittsburgh Times. See also Mulderig vs. Wilkes-Barre Times, 215 Pa. 470. The malice which will defeat conditional privilege must be malice in fact not the malice which the law implies from the intentional doing of a wrongful act without justification or excuse. There is malice in fact when (1) the defendant actually intends to injure the plaintiff; (2) defamatory statements are published with a motive or purpose other than privilege permits even though with an honest belief based on reasonable grounds or (3) when defendant has no honest belief in the truth of his statements; (4) even when he has an honest belief not based on reasonable grounds. Briggs vs. Garrett, 111 Pa. 404. Mulderig vs. Wilkes-Barre Times, 215 Pa. 470. Coates vs. Wallance and Sproul.

In Kemper vs. Fort, 219 Pa. 85, the facts were that the testator devised and bequeathed a portion of his estate to his executors to pay over the income to a daughter for life and after her death to divide the principal among her children. A guardian of one of the children filed a petition for a review of the accounts of the executors and the other son of the daughter notifies the executors that he was the only legitimate child and that the petitioner's ward was illegitimate. The court in this case held that an action for libel could not lie, as the one son was privileged, and that no action will lie for words spoken or written in the course of any judicial proceeding.

The court in this case also says that for false and malicious defamatory allegations appearing in pleadings filed in a court having jurisdiction of what is set forth in them there is absolute immunity from a suit for libel at the instance of the defamed party only when the defamatory words are relevant and pertinent to the matter or matters inquired into by the court. That the legitimacy of the petitioner's ward was a pertinent and relevant matter, was the decision reached.

In view of the fact that the plaintiff has failed to show that there was malice in fact which would destroy the defendant's privilege the judgment must be for the defendant.

OPINION OF THE SUPREME COURT

In a careful opinion of the late C. J. Brown, in Kemper vs. Fort, 219 Pa. 85, the doctrine is affirmed that when a defamatory allegation "is relevant and pertinent, there is no liability for uttering it." Public policy requires this, even if at times the privilege of immunity for false and malicious averments in pleadings is abused.

The pertinence of the defendant's allegation is patent and indisputable. An important property right depended on its truth. He had a right to have its truth investigated.

We must therefore approve of the able manner in which the learned court below has disposed of the case.

JUDGMENT AFFIRMED.

KNIGHT vs. HULTON

Devise with Remainder—Quantum of Estate—Marketable Title Contract for Sale of Land

STATEMENT OF FACTS

John Knight devised "all my real and personal property to my widow, to her use and benefit, with right to use and live there-

from as she may need. After her death, whatever remains of my estate, I give to my son, Henry." The revenue from the land has been only $500 per year. The widow believes she needs $1,000 to live on. She has therefore sold the land in fee to Hulton; when she sues for the purchase money, Hulton refuses to accept the title as unmarketable.

Kauffman for Plaintiff.

Whitlinger for Defendant.

OPINION OF THE COURT

ZICKEL, J.—A fee presumed under the Act of 1833 as well as a fee expressly given by will, can be defeated only by subsequent provisions which show clearly that the testator intended not to give a fee, though he used language which, standing alone, would have effectively limited the estate. Coles vs. Ayres, 156 Pa. 197, Toggs Estate, 27 Sup. 428, is the argument relied upon by the defendant in this case, but I am of the opinion that the devise does not so operate here, the words alleged by the defendant as limiting the quantum of the estate having no such operation in view of the fact that the latter clause is not sufficiently strong to support the above argument and overturn the fee.

In recent decisions, the trend of the majority view seems to be toward allowing no subsequent limitation to affect a devise in fee, that is, an absolute devise of land in fee cannot be modified or cut down by a subsequent provision. Sparr et. al vs. Kidder, 265 Pa. 61, and Glenn app. vs. Stewart, 265 Pa. 209, Hays vs. Viehineier, 265 Pa. 268, Weister vs. Young app., 265 Pa. 393. All the above cited cases holding that a provision in a will to the effect that would ordinarily operate to convey a fee, cannot, by a later declaration indicating an intent to modify so operate as to devise any estate less than a fee.

Of the disputes ending in litigation, those arising under the construction of testamentary documents are by far the most numerous, so numerous that it is difficult to imagine a will containing a phraseology which is really original in the sense of having never been passed upon by any of the many courts where estates real or personal are allowed to pass by inheritance. The case at bar, however, does present a disposition of property so phrased as to prevent my finding a case which has been adjudicated exactly upon this point. I desire to recommend the following cases to the learned counsels for their consumption, in view of the decision here rendered: Allen app. vs. Hirlinger, 219 Pa. 56, which very closely resembles this case, and Heges vs. Ickes app., 267 Pa. 59, which strengthens my decision, and cases cited supra. in this opinion.

Volume 2, American Law Reports, lays down the following rule and cites a long list of cases supporting it: "Where a will gives a life interest by its express terms, with the power of disposing of part or all of the property for the particular purpose of the support and maintenance of the life tenant, with a valid gift over to others, which may be disappointed by the exercise of his power by the life tenant and the application of the principal to the purposes indicated, the life tenant has the right to the entire income of the property, or of so much thereof as is devised to him, depending upon the context of the particular will, and is entitled to encroach upon any or all of the principal of the estate, or the proceeds of the sale of the whole or any part thereof, if such encroachment is necessary for the purpose of obtaining a comfortable support an maintenance of himself, and is made in good faith and not for the purpose of defrauding the remaindermen. He cannot, however, use the corpus for another purpose, nor give it away, nor can he devise it, either by will or by a deed operating as a testamentary disposition.

We are of the opinion that the devise in question must be considered as conveying a life estate, with a contingent remainder over to the son, the contingency being the event of her having remaining at her death any of the property devised by this instrument, in which event the son would take. 265 Pa. 61, 267 Pa. 67.

OPINION OF THE SUPREME COURT

The question is, can Mrs. Knight, the plaintiff, convey a good title to Hulton? If she can, she can specifically enforce the contract.. Otherwise, she cannot.

It is not necessary to say that Mrs. Knight has a fee simple estate. It is enough if she had the power to convey such an estate, and if the deed which she tendered did convey it.

It is evident that the testator intended that she should have power to convey. If she executed this power, the land on which it was exerted, would pass to the purchaser. If she did not execute it, so that the land, at her death would be undisposed of, it would not pass to her heir, as it would had she a fee, but would go to the son of the testator, Henry.

The decision of the widow, Mrs. Knight, that she needs more than $500 per year, cannot be suspected to be without justification; to be made for the mere purpose of avoiding the devise to Henry. If after obtaining the purchase money from Hulton, she consumes only a part of it, the residue will go to

Henry, according to the intention of the decedent.

The cases referred to by the learned trial court sustain its judgment.

AFFIRMED.

COMMONWEALTH vs. HINSON

Murder in First Degree—Constructive Intent—Evidence Heat of Blood

STATEMENT OF FACTS

Murder. Hinson was shown to have had a quarrel with X. A half hour afterwards, he sought out X, who was in the company of Carson, fired a pistol, and, contrary to his intention, killed Carson and did not touch X. The court permitted the jury, on an indictment for the murder of Carson, to convict of murder of the first degree.

Hutchinson for Plaintiff.

Huffman for Defendant.

OPINION OF THE COURT

FALVELLO, J.—It is contended by the defendant that the crime committed was manslaughter and that under the facts, if it was not manslaughter, it could only be murder of the second degree.

It is well settled that if one while attempting to kill a certain person, kills another, he is guilty or innocent to the same extent as he would be had he killed the person he intended to kill. Com. vs. Breyesse, 160 Pa. 451, Com. vs. Eisenhower, 181 Pa. 470. See also Homicide, 13 R. C. L., Sec. 50.

In this case, therefore, Hinson, although indicted for the killing of Carson, is just as guilty as he would be had he killed X, whom he intended to kill, there being no facts to support a contention, if one had been made, that the homicide was justifiable or excusable.

Of what crime would Hinson be guilty had he killed X? Would it be manslaughter, murder in the first or second degree?

The defendant contends that a half hour between the provocation (assuming that it was sufficient and it caused heat of passion) and the killing was not sufficient for the passion of an ordinary man under, or in like circumstances to cool, and that, therefore, he is guilty of manslaughter and not murder.

"What is a sufficient cooling time has never been definitely determined by judicial interpretation or decision, and the question must be settled by the circumstances attending each case. The time in which an ordinary man under, or in like circum-

stances, would have cooled is a reasonable time." Kilpatrick vs. Com., 31 Pa. 198.

We, therefore, think that it is a question for the jury to determine whether or not, under the circumstances an ordinary man would have cooled before the killing. The jury by their verdict have resolved the question against the defendant and further discussion of this phase of the case is not necessary.

The case of Com. vs. Johnson, 219 Pa. 174, relied on by the Commonwealth can be distinguished from the case at bar. In the former the defendant pleaded self-defense, which would be a complete defense, while in the latter, the provocation and passion caused by same, if there were no sufficient cooling time, would only reduce the homicide from murder to manslaughter. The court in the Johnson case said that to "have directed a verdict of manslaughter would have been manifest error." The case, however, is authority for the proposition stated above to the effect that one is responsible for the unintended consequences of his act to the same extent as he would be had he committed the homicide intended.

The next question is whether there was error in permitting the jury to convict of murder of the first degree. The Act of March 31, 1860, P. L. 402, Sec. 74; 1 Purd. 962, provides, inter alia, that "the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether it be murder of the first or second degree." Thus, it is exclusively within the province of the jury trying the case to fix the degree of the crime if they find the defendant guilty of murder. Lane vs. Com., 59 Pa. 371, Rhodes vs. Com., 48 Pa. 396.

OPINION OF THE SUPREME COURT

The opinion of the learned court below makes extended discussion by us unnecessary. That a "quarrel" made defendant willing to kill X by no means mitigates the turpitude of his purpose. What sort of quarrel was it?

If defendant maliciously aimed at killing X, that fact makes him, in the killing of Carson by mishap, as guilty of murder of the first degree as he would have been had he intended to kill Carson.

JUDGMENT AFFIRMED.

AMBROSE vs. HEATH

Contract to Sell Land—Options—Assignments—Specific Performance

STATEMENT OF FACTS

Ambrose is the assignee of Hopper. Heath in writing gave to Hopper the right to become purchaser of a lot for $600. Hopper was to have until May 17th, 1918, to accept the land. The contract was to be void if the option was not exercised by the said date. Hopper on the 12th of May assigned the option to Ambrose, who on May 17th, 1918, gave verbal notice that he accepted the land, tendering the purchase money. This is a bill for specific performance.

Anderson for Plaintiff.

Bernard for Defendant.

OPINION OF THE COURT

YOUNG, J.—In the case at bar three questions are presented to the court. The first of these deals with the assignability of an option. The counsel for the defendant in his brief contends that an option carries with it no interest of an assignable nature, giving as his authority a Federal case; however, the court believes that the following cases cited in 14 Pa. 112, and 216 Pa. 577, state the Pennsylvania view holding that such options are of a character which warrant their assignment.

The next question which arises is whether or not a verbal notice of the option holder is such notice as will result in constituting a good acceptance of the offer. This question may be disposed of by the decisions of the Supreme Court in 69 Pa. 474 and 200 Pa. 618, and particularly Markely vs. Godfrey, reported in 254 Pa. 99.

However, the third question is the one presenting the greatest difficulty. The option to Hopper was to become void upon the 17th of May unless accepted by Hopper before that time. The exact words of the option being "not exercised by the said date." In construing the word "by" the counsel for the plaintiff has cited Webster's and other standard dictionaries in support of his contention that the word signifies "not later than." The legal meaning of the term is said by Cyc. to mean "before" and further states that the last named day is excluded in designating the time of a certain act, several Pennsylvania cases are cited to substantiate this view. So it is evident that Ambrose did not accept the offer within the time appointed.

We are of the opinion that even though the holder of the option did not exercise his right within the perscribed time, the neglect so to do did not result in any injury to the defendant, had the latter conveyed the property upon the 17th of May as was his

right, the plaintiff would have had no ground for a recovery, but this does not appear to be the case. Therefore, in spite of the words specifically avoiding the contract if not accepted by May 17th, we believe that time was not of the essence of this contract, and the petition of the plaintiff for specific performance is granted.

OPINION OF THE SUPREME COURT

One question is, was the option assignable? This we must answer, as did the trial court, in the affirmative. Strasser vs. Steck, 216 Pa. 577; Ruay Co. vs. Spenser, 156 Pa. 85.

The optionee was to have until March 17th, 1918, to accept the land. The notice of acceptance was not given until that day. Was it too late? If Hatfield vs. Clovis, 219 Pa. 168, is correctly decided, it was not too late.

Although we think time was of the essence of the contract, we must reach the conclusion of the learned court below, and the appeal from its decision is

DISMISSED.